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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-6071

CLEVELAND MILLS COMPANY,

Petitioner

vs.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

WHITEFORD S. BLAKENEY
Charlotte, North Carolina
Attorney for the Petitioner

Of Counsel:
BLAKENEY, ALEXANDER & MACHEN
North Carolina National Bank Building
Charlotte, North Carolina 28202

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petitioner prays the Court for a writ of certiorari directed to the United States Court of Appeals for the Fourth Circuit, to the end that this Court may review a decision which has been rendered by the Court of Appeals in a case involving the parties above-named.

OPINIONS OF THE COURTS BELOW

The Opinion of the Court of Appeals has not yet been printed in the official reports, but may be found in 8 EPD ¶9602 and 8 FEP Cases 561. It is also set forth in the Appendix to this Petition.

The case came to the Court of Appeals from the United States District Court for the Western District of North Carolina. The Opinion of the District Court is reported at 364 F. Supp. 1235, and may also be found in 6 EPD ¶8881 and 6 FEP Cases 550. It is likewise set forth in the Appendix to this Petition.

JURISDICTION

The judgment of the Court of Appeals is dated August 19, 1974, and was entered on that date.

Jurisdiction to review, by writ of certiorari the judgment of the Court of Appeals is conferred on this Court by the provisions of 28 U.S.C. §1254.

QUESTION PRESENTED

Is Title VII of the Civil Rights Act, as amended[1], rightly to be construed as conferring upon the Equal Employment Opportunity Commission rights of action which are unending and have no time limitation or expiration?

STATUTORY PROVISIONS INVOLVED

The provisions of the Civil Rights Act, as amended, which are here pertinent, are as follows:

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[1] 42 U.S.C. §§2000e, et seq.; P.L. 92-261, 86 Stat. 103 (1972).

"If within thirty days after a charge is filed with the Commission . . ., the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge . . . The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission . . . If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge . . . the Commission has not filed a civil action under this section . . . or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission . . . shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice . . . Upon timely application, the court may, in its discretion, permit the Commission . . . to intervene in such civil action upon certification that the case is of general public importance . . ."

42 U.S.C. 2000e-5(f)(1)
P.L. 92-261, 86 Stat. 103 (1972)

STATEMENT OF THE CASE

The Equal Employment Opportunity Commission instituted this action in the United States District Court for the Western District of North Carolina, asserting that it was invoking the jurisdiction of that court under the provisions of 28 U.S.C. §§451, 1343, 1345 and the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e, et seq.

The defendant, Cleveland Mills Company, now Petitioner, moved to dismiss the complaint, upon the ground that under the provisions of the amended Statute[1], the time for the bringing of such suit had expired.

The District Court granted the defendant's motion and dismissed the complaint. The Commission appealed to the United States Court of Appeals. The Court of Appeals reversed the decision of the District Court. The defendant now seeks review of that reversal.

This Petition for Certiorari involves no dispute upon any factual matters.

The charge, upon which this case is based, was filed with the Commission, by a member of the Commission, on August 7, 1968. The Civil Rights Act of 1964, both prior to and since its amendment in 1972, has always provided that after a specified time, following the filing of a charge — such time being fixed at 180 days in the amended Statute — if the Commission had not, within such time, entered into a conciliation agreement with the charged party nor instituted a court action, then it

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1 42 U.S.C. 2000e-5(f)(1).

must so notify the person referred to in the charge as the "aggrieved", in order that he might, if he desired, institute a court action.

In the present case, the Commission entered into no conciliation agreement and instituted no court action for more than four and a half years after the filing of the charge. Not until November 28, 1972, did it notify the "aggrieved" persons that it had not entered into a conciliation agreement and had not brought a suit. Thereafter, the "aggrieved" persons did not bring suit. On March 2, 1973, the Commission undertook to do so.

The question at issue is whether that initiation of this court action, on March 2, 1973, was, under the Statute, too late.

REASONS FOR GRANTING THE WRIT

The Statute makes clear that during the first 30 days after a charge is filed, the Commission may seek to conciliate with respect to it, but cannot sue upon it — that then, until a total of 180 days has passed from the filing of the charge, the Commission may conciliate or sue — that at the end of that 180 day period, the Commission must notify the "aggrieved" person that the time is at hand in which he may sue — that the "aggrieved" person's right to sue then exists for 90 days from that notification and expires at the end of that 90 days — and that if the "aggrieved" person does sue within such 90 day period, then the Commission may ask the court for permission to intervene in such suit, and the court "may in its discretion" permit such intervention on the part of

the Commission "upon certification that the case is of general public importance".

From these provisions, it would certainly appear that if the Commission allows its 180 day period to go by without suing, then the right of suing goes over to the "aggrieved" person for a period of 90 days — that if the "aggrieved" person does sue within that 90 day period, then the court may permit the Commission to come in as intervenor — but that otherwise, the Commission's right to court action upon the charge in question has expired.

The Commission's incongruous claim is, however, that the meaning of these statutory provisions is that even after the 180 days has passed and after it has notified the "aggrieved" that he may proceed to sue, the Commission may itself still sue — and that when 90 days beyond the 180 days has also passed, and the right of the "aggrieved" to sue has ended, as the Commission agrees it does, still, says the Commission, its right to sue lives on and is unending and never dies.

It is submitted that such interpretation makes an illogical zigzag indeed of the statutory provisions. So far as court action is concerned, says the Commission, there is first a period within which it alone may sue, then a period within which either it or the aggrieved or both may sue, and then a period within which again it alone may sue— and that this latter period extends forever.

The persons "aggrieved" were certainly the principal objects of Congress' concern. It therefore seems passing strange that Congress, as the Commission contends, would have given a right of action in perpetuity to

the Commission, while at the same time granting only a time-limited and expiring right of action to the "aggrieved".

It, moreover, seems unlikely that Congress would have pointedly fostered multiplicity of court actions by authorizing, the Commission contends, both the "aggrieved" and the Commission to sue on the same charge during the 90 day period specified in the Statute. Since the Statute certainly does not permit any such duplication during the preceding 180 day period, why should it be interpreted as permitting such duplication during the 90 day period? And why should it be considered that after the 90 day period, the Commission still has a never-ending right to sue at any time upon the same charge that the "aggrieved" may have already sued upon during the 90 day period?

All this necessarily follows, however, upon the concept that once any charge has been filed with the Commission, there are no time limits upon the Commission's right to sue on that charge.

It is also to be remembered that, there is the carefully stated provision in the Statute that if the 180 day period has expired and the Commission has brought no suit, and during the following 90 day period the "aggrieved" person sues, then upon application and certification of "general public importance", the court "may in its discretion" permit the Commission to intervene in the suit which has been brought by the "aggrieved".

Why need the Statute affirmatively grant this opportunity — and with express restrictions upon it — if the Commission, as it contends, already has ever-continuing

and unrestricted authority to institute a court action upon the same charge at any time? It would seem clear enough that Congress spelled out this special and restricted route by which the Commission might still come into court after the 180 day period, because Congress considered that otherwise, under the statutory provisions, the Commission would have no access to court after the expiration of that 180 day period.

Finally, there is this cogent and paramount consideration. It is agreed on all sides, and the legislative history of the 1972 amendments to the Act make clear, that Congress was seeking to expedite the handling and disposition of charges filed with the Commission. The Commission's contention on the matter here at issue flies directly in the face of that central purpose.

It defies reason that Congress would have deemed that the way to move the Commission to act with expedition, either in conciliating or suing, was to inform the Commission, by statute, that the law imposes no time limitations upon it — and that if it chooses, *it may have forever within which to act*, either as to conciliating or suing.

In a number of well considered decisions, various of the United States District Courts have decided the question here at issue as did the District Court in the present case, and contrary to the ruling of the Court of Appeals in this case. These decisions include the following:

EEOC vs. General Dynamics Corp., 8 EPD ¶9724 (N.D. Tex., 1974).

EEOC vs. Kimberly-Clark Corp., 7 EPD ¶9336 (W.D. Tenn., 1974).

EEOC vs. Griffin Wheel Co., 7 EPD ¶9202, 7 FEP Cases 484 (N.D. Ala., 1974).

EEOC vs. Union Oil Co., 369 F. Supp. 579, 7 EPD ¶9163 (N.D. Ala., 1974).

EEOC vs. Container Corp., 352 F. Supp. 262, 5 EPD ¶8014 (N.D. Fla., 1972).

EEOC vs. Louisville & Nashville Railway, 368 F. Supp. 633, 7 EPD ¶9070, 6 FEP Cases 1265 (N.D. Ala., 1974).

EEOC vs. U. S. Pipe & Foundry Co., 375 F. Supp. 237, 8 FEP Cases 335 (N.D. Ala., 1974).

EEOC vs. Berman Brothers Iron and Metal Co., 7 EPD ¶9212, 8 FEP Cases 96 (N.D. Ala., 1974)[1].

Decisions in opposite directions are proliferating. The question is one which should be settled by this Court.

It is, of course, to be borne in mind that the right of action here in issue is totally a creation of this Statute.

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1 Various other decisions in United States District Courts take a divergent view. They include: — *EEOC vs. U. S. Industries*, 7 EPD ¶9068 (W.D. Tenn., 1974); *EEOC vs. E. I. DuPont DeNemours & Co.*, 373 F. Supp. 1321, 7 EPD ¶9324 (D. Del., 1974); *EEOC vs. Huttig Sash & Door Co.*, 371 F. Supp. 848, 7 EPD ¶9168 (S.D. Ala., 1974); *EEOC vs. Bartenders International Union*, 369 F. Supp. 827, 6 EPD ¶8702 (N.D. Cal., 1973); *EEOC v. Eagle Iron Works*, 367 F. Supp. 817, 7 EPD ¶9059 (S.D. Iowa, 1973); *EEOC vs. Duff Brothers, Inc.*, 364 F. Supp. 405, 6 EPD ¶8910 (E.D. Tenn., 1973).

It has existence only if and to the extent that this statutory enactment gives it existence.

"The cause of action did not exist before, and is the creature of the statute . . . The statute thus creates a new liability and gives a special remedy for it, and upon well-settled principles the limitations upon such liability become a part of the right conferred, and compliance with them is made essential to the assertion and benefit of the liability itself".

United States vs. McCord, 233 U.S. 157, 162, 34 S. Ct. 550, 58 L. Ed. 893, 897 (1914)

"A statute which in itself creates a new liability, [giving] an action to enforce it unknown to the common law, and [fixing] the time within which that action may be commenced, is not a statute of limitations. It is a statute of creation, and the commencement of the action within the time it fixes is an indispensable condition of the liability and of the action which it permits. The time element is an inherent element of the right so created, and the limitation of the remedy is a limitation of the right".

Simon vs. United States, 244 F. 2d 703, 705 (5th Cir., 1957)

With regard to such inherent time limitations, it has been emphasized that:

"Such periods are established to cut off rights, justifiable or not, that might otherwise be asserted and they must be strictly adhered to by the judiciary. *Rosen-*

man vs. United States, 323 U. S. 658, 661, 89 L. Ed. 535, 65 S. Ct. 536. Remedies for resulting inequities are to be provided by Congress, not the courts".

Kavanagh vs. Noble, 332 U.S. 535, 539, 68 S. Ct. 235, 237, 92 L. Ed. 150, 153 (1947).

"Its [the Commission's] brief is permeated with the idea that the court should find some excuse to evade rather than comply with the statute. As illustrative, it argues that the opinion of the court below 'is a narrow reading of the Title inimicable to its remedial purpose'; that grievants should be required 'to do only what it is in their power to do' . . . Surely, Congress was fully aware of the remedial purposes of the Act and designated a procedure to accomplish that end . . . [I]t little behooves the Commission to argue or a court to hold that the filing of a complaint beyond the time specified is reasonable and, therefore, sufficient".

Harris vs. National Tea Company, 454 F. 2d 307, 309-310 (7th Cir., 1971)

CONCLUSION

Upon all of the foregoing, the Petitioner prays that the Court grant a writ of certiorari, in order that the decision of the Court of Appeals may be reviewed by this Court.

Respectfully submitted,

WHITEFORD S. BLAKENEY
Attorney for the Petitioner